



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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In the matter of:

The Involvement of Pacific Gas and Electric
Company's Electric Facilities in the 2020 Zogg
Fire

Docket No. _____

**PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E)
REQUEST FOR HEARING**

On October 25, 2022, the Safety and Enforcement Division (SED) of the California Public Utilities Commission (the Commission) issued a proposed Administrative Enforcement Order (Proposed Order) to Pacific Gas and Electric Company (PG&E) related to the 2020 Zogg Fire. In addition to imposing certain corrective actions, the Proposed Order directs PG&E to pay penalties totaling \$155,400,000 for alleged violations of General Order (GO) 95, Rule 31.1; GO 165, Section III.B; and Public Utilities Code section 451. Pursuant to the Enforcement Policy adopted by the Commission in Resolution M-4846, PG&E respectfully submits this request for an evidentiary hearing on the Proposed Order (Request for Hearing).

I. INTRODUCTION

SED bears the burden of proving a violation of law, rule, or order that justifies the imposition of penalties.¹ The Proposed Order finds four violations of Commission rules and regulations and imposes penalties for each violation:

¹ See, e.g., D.99-11-055, 1999 WL 33588638 ("In an enforcement proceeding, the party seeking the penalty bears the burden to show a violation of a law, rule or order."); D.15-08-031 at 27 ("The burden of proof is on SED to show by a preponderance of the evidence that respondent . . . violated California law or regulations."); D.14-12-001 at 21 (affirming that "staff has the burden of proof by a preponderance of the evidence" pursuant to electric safety citation program). The Commission affirmed in Resolution M-4846 that "nothing in this [Enforcement] Policy shifts any burden of proof, evidentiary standards, or otherwise applicable procedural requirements." Resolution M-4846 at 9–10.

Violation No.	Alleged Violation	Start and End Dates	Daily Fine	Total Fine
1	GO 95, Rule 31.1: Failure to perform CEMA patrol in 2019	10/31/19 – 9/27/20	\$100,000	\$33,300,000
2	GO 165, Section III-B: Failure to perform intrusive inspection	3/31/07 – 9/22/11	\$50,000	\$81,850,000
3	GO 95, Rule 31.1: Failure to retain hard copy vegetation control map	3/27/19 – 3/27/19	\$50,000	\$50,000
4	PUC § 451: Failure to remove trees due to poor recordkeeping	8/23/19 – 9/27/20	\$100,000	\$40,200,000
			Total:	\$155,400,000

We will continue to work with SED to further enhance the safety of our electric facilities. However, the Proposed Order should not be adopted because it (i) does not identify facts sufficient to support these alleged violations, and (ii) imposes penalties that are excessive even if the violations could be proven.

II. THE PROPOSED ORDER DOES NOT IDENTIFY EVIDENCE SUFFICIENT TO SUPPORT THE ALLEGED VIOLATIONS

Alleged Violation No. 1. The Proposed Order finds a violation of GO 95, Rule 31.1 based on the fact that PG&E did not perform a separate CEMA patrol² of the alleged area of origin of the Zogg Fire in 2019.³ Rule 31.1 requires that “[e]lectrical supply [] systems shall be designed, constructed, and maintained for their intended use, regard being given to the conditions under which they are to be operated, to enable the furnishing of safe, proper, and adequate service.” The SED Investigation Report finds that PG&E violated Rule 31.1 “for failing to properly follow its own procedures by not conducting a separate CEMA patrol in 2019.”⁴ Neither the Proposed Order nor the SED Investigation Report cite any authority, nor do they

² PG&E’s internal procedures use the term “second patrol” rather than “CEMA patrol,” but we adopt the term “CEMA patrol” herein to avoid confusion.

³ Proposed Order at 7.

⁴ SED Investigation Report at 16.

provide any analysis, to support the conclusion that the absence of a separate CEMA patrol in 2019 as contemplated by PG&E's written procedures automatically constitutes a violation of Rule 31.1. Rather, PG&E submits that Rule 31.1 requires SED to demonstrate that the utility's conduct resulted in conditions that were unsafe, improper, or inadequate. A decision not to conduct a CEMA patrol at a given time, by itself, does not meet this standard.⁵

To the contrary, the SED Investigation Report affirms that PG&E performed eight vegetation management patrols in the alleged area of origin between March 2016 and April 2020, and identified several trees in the area of interest for removal and trimming.⁶ The SED Investigation Report further affirms that the subject tree was not identified for removal or trimming as a result of any of those routine or CEMA patrols, including the 2020 routine patrol that followed the purportedly missed CEMA patrol in 2019.⁷ Photographs of the subject tree from the July 2019 LiDAR indicate the subject tree had a green canopy and appeared healthy, as confirmed by inspectors that performed the routine vegetation management patrols in 2018, 2019, and 2020.

While the Proposed Order appears to rely on SED's belief that "a CEMA patrol could have potentially identified the tree that caused the fire,"⁸ the Proposed Order does not identify evidence sufficient to support such a finding. In fact, the evidence will show that the 2020 routine patrol resulted in an increase in the forecast number of trees identified for work in the Zogg Mine Road area, in part based on the inspector's recognition that the area had not been inspected since April 2019.

⁵ The SED Investigation Report also does not consider the reasons a separate CEMA patrol was not conducted in 2019. In 2019, PG&E transitioned to risk-based scheduling of routine vegetation management patrols so that higher risk circuits would be worked before the peak of the traditional fire season. That transition caused the scheduled routine vegetation management patrol of the Zogg Mine Road area to be moved up from October 2019 to May 2019. Due to issues surrounding that change, which can be addressed in more detail at the hearing, a separate 2019 CEMA patrol was not conducted.

⁶ SED Investigation Report at 15.

⁷ *See id.* at 16.

⁸ Proposed Order at 10.

Alleged Violation No. 2. The Proposed Order finds that PG&E failed to perform an intrusive inspection on pole 101457903 as required by GO 165.⁹ The basis for this violation is a Pole Detail Report provided by PG&E, which describes a 2002 inspection of the pole as “Visual Inspection Only,” while inspections in 2011 and 2018 are described as involving tests performed in connection with intrusive pole inspections.¹⁰ The fact that PG&E was unable to locate a record of an intrusive inspection prior to 2011 does not prove that such an inspection did not occur. As previously explained to SED in discovery, the Pole Detail Report includes a description of the type of inspection conducted in 2011 that strongly indicates there *was* a prior intrusive inspection on this pole.¹¹ The Proposed Order does not identify evidence sufficient to support a finding that there was no intrusive inspection of pole 101457903 prior to 2011.

Alleged Violation No. 3. The Proposed Order finds that PG&E’s inability to provide SED with a copy of the hard copy map from the 2018-2019 vegetation control (VC) inspections constitutes a violation of GO 95, Rule 31.1.¹² The basis for the violation is a 10-year retention period set forth in PG&E’s internal Inspection Mapping Procedure.¹³ As noted, the failure to comply with an internal procedure, without more, does not establish a violation of Rule 31.1. To the contrary, the Proposed Order affirms that “PG&E performed annual VC inspections in the area around the origin area of the Zogg Fire.”¹⁴

⁹ *Id.* at 7.

¹⁰ *Id.* (citing SED Investigation Report at 12 with reference to Pole Detail Report provided at PGE-ZOGG-CPUC-00017579–PGE–ZOGG-CPUC-00017581).

¹¹ PG&E explained in response to SED’s Data Request SED-004, Question 3 that the “Visual Sound and Pull” test on September 22, 2011 reflected in the Pole Detail Report suggests the pole was subject to an intrusive inspection prior to 2011. A “Visual Sound and Pull” test involves removing the plug from a previously-bored hole to inspect the pole.

¹² Proposed Order at 7.

¹³ *See id.* at 7–8 (citing “PG&E Inspection Mapping Procedure” as basis for Rule 31.1 violation).

¹⁴ *Id.* at 7. PG&E provided SED with numerous records documenting VC inspections in the Zogg Mine Road area, including hard copy maps, electronic VC inspection records, and work requests associated with VC inspections.

Alleged Violation No. 4. The Proposed Order finds a violation of Public Utilities Code section 451 based on a “[f]ailure to remove trees identified for removal by inspectors due to poor recordkeeping.”¹⁵ The Proposed Order acknowledges that “it is not clear which Tree ID is associated with the tree that fell and struck the conductors.”¹⁶ While the Proposed Order goes on to state that “SED has determined with a high degree of certainty that the tree that fell and struck the power lines” was one of the trees marked for removal in connection with the post-Carr Fire efforts,¹⁷ it does not identify evidence sufficient to support such a finding. Moreover, the assertion in the Proposed Order that “there were no other Gray Pines in the area other than Trees 6557 and 6558 that could have been the tree that fell”¹⁸ is not consistent with the evidence that there were, in fact, four gray pine trees in the immediate area.¹⁹ Finally, the Proposed Order does not identify evidence sufficient to prove that any tree was not removed “due to poor recordkeeping.”²⁰ The evidence shows that PG&E performed routine vegetation management patrols in the alleged area of origin in October 2018, April 2019, and March 2020, and that the subject tree was not identified for removal as a result of any of those inspections. The Proposed Order acknowledges the evidence indicating that a decision was made to rely on routine patrols to address remaining tree removals relating to the post-Carr Fire efforts in light of safety issues encountered in connection with those efforts.²¹

¹⁵ *Id.* at 8; *see also id.* at 4–6.

¹⁶ *Id.* at 4.

¹⁷ Proposed Order at 4–5.

¹⁸ *Id.* at 5.

¹⁹ *See* SED Investigation Report at 19 (describing PG&E response to SED Data Request SED-001, Question 12(a), identifying “three other Gray Pines near the Gray Pine collected by CAL FIRE”); *see also* PG&E’s response to SED Data Request SED-006, Question 7.

²⁰ Proposed Order at 8.

²¹ *Id.* at 3.

III. THE PENALTIES FOR THE ALLEGED VIOLATIONS ARE EXCESSIVE

Even if SED could prove the alleged violations set forth in the Proposed Order, the penalties imposed for the four alleged violations are excessive and should not be adopted by the Commission.

Alleged Violation No. 1. The Proposed Order imposes a total penalty of \$33,300,000 for the alleged failure to perform a separate CEMA patrol of the alleged area of origin in 2019. SED calculates this penalty by multiplying the maximum daily penalty pursuant to Public Utilities Code section 2107 (\$100,000)²² by 333 total days of a continuing violation.²³ The Proposed Order appears to rely on SED's belief that "a CEMA patrol could have potentially identified the tree that caused the fire" to justify imposition of the maximum daily penalty.²⁴ As set forth above, however, the Proposed Order does not identify evidence sufficient to support such a finding. The penalty is also excessive because the Proposed Order erroneously extends the period of the alleged continuing violation. Most notably, the "end date" for an alleged failure to inspect should be the date on which the next inspection of the area was completed, which was March 26, 2020, and not the later date of ignition of the Zogg Fire. There is no basis to impose penalties beyond the date on which this area was subject to a comprehensive routine vegetation management patrol.²⁵

Alleged Violation No. 2. The Proposed Order imposes a total penalty of \$81,850,000 for the alleged failure to perform an intrusive pole inspection on pole 101457903. SED calculates this penalty by multiplying a daily fine of \$50,000 by 1,637 total days of a continuing violation.²⁶ The Proposed Order describes this alleged violation as "unrelated to the cause of the

²² See Pub. Util. Code § 2107 (specifying penalty range of \$500 to \$100,000).

²³ Proposed Order at 9.

²⁴ *Id.* at 9–10 (describing consequences of the Zogg Fire and stating that "[t]he severity of this offense favors imposing the maximum daily penalty").

²⁵ PG&E also does not agree with the October 31, 2019 start date set forth in the Proposed Order, and submits that a more appropriate start date for the alleged continuing violation would be December 31, 2019 (year's end).

²⁶ Proposed Order at 9.

fire.”²⁷ This penalty is unlawful on its face because it purports to impose a daily fine that exceeds the statutory maximum in effect at the time of the alleged continuing violation (March 31, 2007 through September 22, 2011), which was \$20,000.²⁸ This penalty is also inconsistent with the Commission’s Penalty Assessment Methodology. A penalty of \$81,850,000 for an alleged failure to perform a single intrusive inspection that was unrelated to ignition of the Zogg Fire, caused no other public harm, and was corrected more than a decade ago, is grossly excessive.²⁹

Alleged Violation No. 3. The Proposed Order imposes a \$50,000 penalty for the alleged failure to retain a hard copy map associated with the 2018-2019 VC inspections.³⁰ The Proposed Order describes this alleged violation as a “recordkeeping violation [] unrelated to the cause of the fire.”³¹ The \$50,000 penalty for misplacement of a single hard copy map is excessive,

²⁷ *Id.* at 10.

²⁸ At the time of this alleged violation, the maximum penalty pursuant to Public Utilities Code section 2107 was \$20,000. Section 2107 was amended, effective January 1, 2012, to increase the maximum penalty from \$20,000 to \$50,000, and later amended again, effective January 1, 2019, to increase it from \$50,000 to \$100,000. These increased penalty amounts cannot be applied to conduct that pre-dates the effective dates of those amendments. *See, e.g., Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839–840 (retroactive application of “a statute that operates to ‘increase a party’s liability for past conduct’” “is impermissible unless there is an express intent of the Legislature to do so”); *id.* at 841 (“[T]he presumption that legislation operates prospectively . . . is rooted” in the Due Process Clause’s “protect[ion of] the interests in fair notice and repose that may be compromised by retroactive legislation.”); *Franchise Tax Bd. v. Superior Court* (2013) 221 Cal.App.4th 647, 659 (finding “forbidden” the retroactive application of a statutory amendment increasing monetary penalty to past conduct); *Di Genova v. State Bd. of Ed.* (1962) 57 Cal.2d 167, 172–173 (“[T]he rule against retroactive construction” applies “uniformly” to “all [California] statutes.”); *Aetna Cas. & Sur. Co. v. Industrial Acc. Commission* (1947) 30 Cal.2d 388, 396 (reversing the retroactive application of a statutory amendment where “it [did] not clearly appear from the language of the amended statute . . . that the Legislature intended it to apply in cases where the injury occurred before the effective date”).

²⁹ The Pole Detail Report indicates that pole 101457903 was assigned a “pass” rating in connection with the 2011 and 2018 inspections, further underscoring that any alleged missed inspection prior to 2011 caused no public harm.

³⁰ Proposed Order at 9.

³¹ *Id.* at 10.

especially when PG&E provided SED with numerous other records documenting the VC inspections at issue.³²

Alleged Violation No. 4. The Proposed Order imposes a total penalty of \$40,200,000 for the alleged failure to remove trees identified for removal by inspectors. SED calculates this penalty by multiplying the maximum daily penalty (\$100,000) by 402 total days of a continuing violation.³³ The Proposed Order appears to rely on SED's belief that "this violation directly caused the fire" to justify imposition of the maximum daily penalty.³⁴ As set forth above, however, the Proposed Order does not identify evidence sufficient to prove that the tree that fell and struck the conductors was one of the two gray pine trees marked for removal in connection with the post-Carr Fire effort. Nor does the Proposed Order identify evidence sufficient to prove that any alleged poor recordkeeping caused the two trees marked during the post-Carr Fire effort not to be removed.

IV. CORRECTIVE ACTION

The Proposed Order directs PG&E to submit to the Office of Energy Infrastructure Safety (OEIS) a Corrective Action Plan that includes new systems related to tree removal work.³⁵ PG&E's highest responsibility is the safety of our facilities, and we are committed to working cooperatively with Commission staff to implement systems to address the concerns identified in the Proposed Order. To that end, we respectfully request the opportunity to address certain ambiguities and timing challenges raised by the Proposed Order before corrective action requirements are adopted by the Commission.

As an initial matter, it is not reasonable to require PG&E to submit the Corrective Action Plan within 30 days of a final order in this proceeding in light of the nature of the systems

³² The Commission's Enforcement Policy identifies recordkeeping deficiencies "that do not prevent staff from determining compliance" as an example of "administrative" violations that may not warrant imposition of a penalty. *See* Resolution M-4846, Attachment at 9 fn. 3.

³³ Proposed Order at 9.

³⁴ *Id.* at 10.

³⁵ *Id.* at 13–14 (Para. 13).

described in the Proposed Order and the scope of our vegetation management program. PG&E annually inspects trees along approximately 81,000 miles of overhead distribution lines and 18,000 miles of overhead transmission lines, and has forecast routine vegetation management work on approximately 1.5 million trees in 2023 along distribution lines alone. While we will begin the process now, it will take time to finalize a fully developed and effective plan to implement and integrate the new systems into existing vegetation management processes.

In addition, we request the opportunity to address certain ambiguities that should be clarified to facilitate successful implementation of the specific systems described in the Proposed Order. For example, the systems will need to account for constraints outside of PG&E's control with respect to tree removals and the spray painting of trees, including property owner permissions, permitting requirements, and weather and other environmental restrictions. It should also be clarified that the new systems are to be implemented on a going forward basis, with the ability to make refinements determined to be necessary as the systems are operationalized.

Finally, the Proposed Order states that the Corrective Action Plan must include, in addition to the specific systems described therein, "[a]ny other systems requested by OEIS to ensure that another wildfire does not occur for similar reasons as the Zogg Fire."³⁶ The inclusion of such a broad, open-ended corrective action requirement is not reasonable or appropriate, especially when the Proposed Order states that PG&E would be subject to further penalties for "failure to comply" with required corrective actions.³⁷ To the extent the Commission is not inclined to simply remove this provision of the Proposed Order, the provision should be modified to incorporate a well-defined framework to identify and implement corrective actions beyond those set forth in the Proposed Order, with further due process.

³⁶ *Id.*

³⁷ *Id.* at 14 (Para. 15).

V. CONCLUSION

We request the opportunity to explain further at an evidentiary hearing why the alleged violations set forth in the Proposed Order are not supported by sufficient evidence, why the penalties imposed in the Proposed Order are excessive, and why the corrective action order should be modified. PG&E reserves all rights with respect to the presentation of issues at the evidentiary hearing on these matters, including the right to refine the legal and factual arguments set forth herein, and to raise additional such arguments.

Respectfully submitted,

/s/ Alyssa T. Koo

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